

THE INCREASING ROLE OF INTEREST GROUPS IN INVESTMENT TRANSACTIONS INVOLVING INTERNATIONAL FINANCIAL INSTITUTIONS

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I would like to welcome you to our panel on the Increasing Role of Interest Groups in Investment Transactions Involving International Financial Institutions. Our objective today is to discuss the growing impact on international investment transactions of local and international interest groups—organizations such as business associations, consumer, environmental and human rights groups, community activists and labor associations. As will become apparent from the presentations, the role of interest groups has grown in parallel with the increased participation of international financial institutions (IFIs) as financing sources for these investments. Our panel will focus on individual projects in which IFIs participate, not (as other panels are addressing during this conference) on the impact of interest groups on change within the institutional frameworks of those financial institutions.

For many years, multilateral development organizations like the World Bank Group, the Asian Development Bank and the Inter-American Development Bank focused their efforts on the public sector. Indeed, the Articles of Agreement of the World Bank limit World Bank loans and guarantees solely to public sector entities. Since the early 1990s, however, multilateral institutions have become important contributors to the financing of private sector investments in emerging markets. The International Finance Corporation and the Multilateral Investment Guarantee Agency have led this reorientation within the World Bank Group, and the World Bank itself has placed a carefully circumscribed toe in the waters of privately financed infrastructure through its partial-risk guarantee program and through sector adjustment loans intended to assist privatizations. Faced with fewer charter constraints, the Asian Development Bank and the Inter-American Development Bank also moved in the mid-nineties to provide direct debt and equity support for private sector projects in areas considered central to economic and social development in member countries.

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National governments also refocused their financial support in the 1990s towards the private sector in emerging markets, particularly to support purchases of goods and services exported from their own markets. National export credit agencies (ECAs) such as United States Eximbank, CoFACE, ECGD, JBIC and Hermes and investment promotion agencies such as the United States Overseas Private Investment Corporation (OPIC) have become substantial providers of guarantee and loan assistance to privately owned infrastructure projects and other investments in emerging market economies.

The participation of multilateral and national IFIs in private direct investment transactions has carried with it an increasing voice for local and international interest groups in those transactions. The growing role of interest groups is not surprising in hindsight. Multilateral financial institutions have been under great pressure to open their own processes to these groups, as have ECAs in various countries. The involvement of an IFI in a private transaction creates a natural platform for interest groups to seek a more forceful role in structuring and implementing the investment.

Examples of recent investment transactions in which interest groups are playing prominent roles abound. For example, the Chad-Cameroon petroleum development and pipeline project has achieved considerable attention, as environmental and development non-governmental organizations (NGOs) and community groups have challenged the role of the World Bank, the European Investment Bank and several ECAs in providing support for the project.

The Chad-Cameroon project is a \$3.5 billion oil field development and oil pipeline project to develop the Doba oilfields in southern Chad and transport the oil by means of a 1070 km pipeline to a marine terminal at Kribi on the Atlantic coast of Cameroon. The project was approved by the World Bank in June 2000, but remains mired at this time in controversy over a number of issues, including the alleged diversion towards arms purchases by Chad of part of an initial payment by the project sponsors. The principal international sponsors are Exxon Mobil, Petronas and Chevron, and both Chad and Cameroon will also participate as equity investors in the project. The World Bank and the European Investment Bank propose to lend approximately \$115 million to these governments to finance acquisition of the equity interests. In addition, about thirty-seven percent of the cost of constructing the project will be raised as loans from IFIs or in the commercial bank debt markets, with virtually all of that indebtedness covered by political risk or comprehensive support provided by ECAs or funded directly by IFIs.

The World Bank also anticipates providing loans of \$17.5 million to Chad and \$5.77 million to Cameroon to finance "capacity-building" for the purpose of enabling those governments to maintain adequate oversight of the project and its effect on the affairs of the host country. The International Development Association (IDA), the World Bank's lending arm for the poorest countries, will

provide further capacity-building support of \$23.7 million and \$5.8 million, respectively, in equivalent credits. The impact on Chad will be especially pronounced. As the World Bank has stated, "Chad's capacity weakness is of particular concern. This weakness is all-encompassing and greater than in most sub-Saharan countries, reflecting the impact of almost three decades of civil strife"¹ Once revenues commence, the project could bring Chad revenues of about \$200 million each year for the next quarter-century, resulting in a doubling of the country's budget. The capacity-building loans are intended to finance the building of the institutional capability within the two governments to effectively absorb and allocate the large anticipated in-flows. Taking together all forms of IFI assistance, official credit support is thus directly necessary for raising about forty percent of all project costs, and additional World Bank loans are financing reforms to mitigate the adverse impact of the projected flood of revenues on weak government institutions in the host countries.

Local and international NGOs have criticized the proposed oil field and pipeline project severely for a number of reasons and in a number of forums. Environmental and social objections include concerns over the loss of livelihoods and resettlement of rural peoples; loss of biodiversity; the impact of leaks from underground pipelines; and the impact on coastal areas of a heavily-trafficked marine terminal. Broader criticisms include the risks to Chad and Cameroon of relying on oil production to fuel development, the risks of non-transparency and corruption resulting from large flows of hard currency into destitute economies, the potential for re-igniting the civil war in Chad and the clash between "traditional peasant culture and the expatriate oil business way of life."² As broad as these criticisms may be, the range of organizations raising these questions and criticisms has been equally broad, including over eighty local and international NGOs. Those NGOs have employed several platforms to encourage debate over these issues: formal presentations to the World Bank, the European Investment Bank and those ECAs with organized program for public comment; open letters to the World Bank and others; lobbying campaigns aimed at national government representatives to the World Bank or aimed at Western legislators; a sustained campaign to bring media attention to bear on the project; and flooding of the sponsors, the financial advisor and

1. International Bank for Reconstruction and Development, Report No. 19427-CD, Project Appraisal Document on a Proposed Credit in the Amount of SDR 12.6 Million. (USD 17.5 Million Equivalent). The Government of Chad for Management of the Petroleum Economy Project, at 3 (December 29, 1999), downloadable at <http://www.worldbank.org/> (last visited May 17, 2001).

2. See generally Korinna Horta, *Questions Concerning The World Bank and Chad/Cameroon Oil and Pipeline Project: Makings of a New Ogoniland? Corporate Welfare Disguised as Aid to the Poor?*, available at <http://www.edf.org> (last visited Mar. 17, 2001).

various public organizations with mail and e-mail messages objecting to the project.

As a consequence of this clamor, a number of actions occurred. Two original sponsors, Shell and ELF, withdrew from the project amid speculation that the strong opposition to the project influenced their decisions. The pipeline location itself was modified significantly. A host of local consultation meetings occurred. Faced with criticism of its own procedures in approving the project, as well as the impact of the project on the host countries, the Bank determined to establish an International Advisory Group (IAG) that would monitor implementation of the project, although disagreements between NGOs and the Bank still exist over membership on the IAG and the Terms of Reference for the panel.

Of special importance, the World Bank, the host governments and the project also structured a system of controls over project disbursements and revenues intended to assure future transparency in the use by Chad and Cameroon of those monies. For example, under the revenue management program for Chad, the government of Chad has agreed to an extraordinary level of extra-governmental involvement in control over its portion of project revenues. Petroleum revenue from the project will be channeled through the project's audited offshore accounts and ninety percent of Chad's portion of that revenue (once released to Chad by the project company) will be transferred to special accounts of the Chad Treasury maintained at two designated commercial banks acceptable to the World Bank. Disbursements from those accounts will only be made in accordance with pre-agreed development objectives set out in the revenue management program and approved by the Chad Parliament, and must be reviewed in advance by an Oversight Committee composed of representatives of the Chad Government, the Chad Parliament, a local NGO and a trade union representative. The Oversight Committee will issue quarterly reports and all audits and reports of the Oversight Committee will be published. The special accounts will be audited by auditors acceptable to, and with terms of reference agreed by, the World Bank, and the World Bank and the IMF will conduct periodic joint expenditure reviews. A separate investment fund covering the remaining ten percent of Chad's project revenues will be subject to similar auditing and oversight arrangements, as well as investment criteria pre-agreed with the World Bank. These control and audit procedures were established by means of legislation enacted by the Chad Parliament, not merely contracts and government decrees, to maximize support across all political institutions. The commitment of the government of Chad to the principles underlying these procedures, however, has been called into controversy by the alleged diversion to military expenditures of a portion of a twenty-seven million advance payment, even though the procedures have yet to be put into place.

I have handed out an excerpt from ExxonMobil's project web page summarizing the scope of public consultation by the Chad-Cameroon project with local communities, local and international NGOs and resulting actions.³ NGOs, though, continue to criticize the project's consultation process as inadequate. Regardless of one's personal view of the project or the efficacy of its consultative process, the twenty-two pages from this excerpt demonstrate that a large quantity of project time, resources and planning has been devoted toward addressing the issues raised as a result of the activities of the NGOs, community activists and the media. The impact of interest groups on the time and resources of the project, its private sector participants and the IFIs is apparent. Moreover, this short summary also illustrates the leverage for NGOs created by IFI involvement in the project. It is hard to imagine such a process for a petroleum project just 10-15 years ago.

In addition to focusing on individual investment transactions, of course, these interest groups are also engaged in active lobbying and negotiating campaigns to dramatically change the institutional frameworks of IFIs. It is very difficult to draw a conceptual line between the pressure on IFIs to institutionally accommodate interest group concerns and the pressure on individual IFI-supported investments to restructure themselves in response to interest group concerns. Lobbying for institutional change is, of course, intended to result in changes in how IFIs treat individual projects, and lobbying about individual projects will necessarily carve new channels within the institutions that result in institutional changes as well as changes to the targeted projects. There is, however, a very practical difference. The practicing bar, particularly private sector lawyers, are finding the day-to-day activities of their clients in individual investment transactions are being affected by these interest groups, and therefore the nature of the work undertaken by project participants is beginning to change in a significant fashion. These investors now develop environmental impact, community development and public affairs programs as essential components of their project development activities.

Why are these changes occurring now? First, as the Chad-Cameroon story illustrates, the direct participation of IFIs in the financing of individual private sector investments creates formal and informal platforms for NGO involvement that did not previously exist. As IFIs continue to shift their attention toward promoting the private sector in weak economies, the opportunities for interest groups to use IFI leverage will continue to grow.

Another development in international economic relations is also likely to accelerate the involvement of NGOs in individual transactions. The web of international agreements on commercial matters now extends far beyond the

3. Chapter 9, *Public Consultation Process and Results*, available at <http://www.essochad.com/eaiff/essochad/documentation/summary/9.html> (last visited Mar. 17, 2001).

purchase and sale of goods and services, and related tariff and non-tariff barriers. The Agreement on Trade-Related Investment Measures (TRIMS) and the investment-related provisions of NAFTA are examples of increased multilateral involvement in individual investment transactions. Although neither the WTO dispute settlement understanding nor NAFTA dispute resolution procedures permit direct NGO intervention in disputes over breaches of TRIMS or NAFTA commitments, NGOs are increasingly adept at pressing national governments to incorporate interest group views into positions taken by those governments on those disputes. And pressure continues to grow for direct participation of NGOs in dispute procedures under those agreements. Three recent NAFTA disputes, one involving issues of environmental licensing in Mexico, the second claiming expropriation in light of a large award of punitive damages by a Mississippi jury in civil litigation and the third seeking damages for the ban by California of the gasoline additive MTBE, have highlighted for many United States activists the importance of finding a means of participating in NAFTA dispute proceedings involving individual investments.⁴

More generally, the provisions in NAFTA and the General Agreement on Trade in Services (GATS), and subsidiary understandings such as the Reference Paper on Telecommunications Services, requiring Member States to maintain transparency, impartial administrative tribunals and review of such matters as tariff and pricing, anti-competitive conduct of certain service monopolies and the like encourage the development of host government institutions accessible to NGOs as well. For example, to head off a United States complaint to the WTO that Mexico has violated GATS telecommunications commitments by permitting the former public telecoms monopoly, Telmex, to charge high interconnection tariffs, the Mexican government has proposed among other matters to make available additional resources to COFETEL, Mexico's telecommunications regulatory agency. This GATS-encouraged enhancement of the resources and independence of a national regulatory agency should result in the growth of another forum for interest group involvement in decisions (in this case, the pricing of telephone services and the availability of consumer choices) affecting individual telecommunications investments.

Further, notions of privatization are deeply affecting the structure of international investments in emerging markets. Many high-profile privatization transactions of public infrastructure or sensitive industries now combine private and public participants in transactions that politicians and public affairs

4. *Metalclad v. United Mexican States*, available at <http://www.naftalaw.org/metalclad.pdf> (last visited Mar. 17, 2001), *R. Loewen and Loewen Corp. v. United States of America*, available at <http://www.naftaclaims.com> (last visited Mar. 17, 2001), and *Methanex Corporation v. United States of America*, available at <http://www.naftaclaims.com> (last visited Mar. 3, 2001).

specialists fondly call “public-private partnerships.” The participation of private investors and public authorities in the same transaction assures the interest of local and international groups in the public sector decision-making process regarding the project. As public and private participants become intertwined within the confines of a single project, interest group access to the public sector parties creates opportunities for NGO access to decisions made by the private sector participants as well.

The impact of interest groups on individual investment transactions will only increase over the next decade, as these groups gain experience in using newly provided platforms and in mobilizing attention and resources to focus on particular projects. By way of illustration, the International Program of Friends of the Earth, a prominent and aggressive environmental protection organization, includes ten staffers (underpaid as they may be) following the environmental impact of individual IFI-supported investment project worldwide. Accordingly, the day-to-day activities of the private sector participants in these projects, and their counsel, are rapidly changing to address the *de facto* involvement of new parties in structuring the project.

Let me now introduce our panelists to continue to explore these issues. Barry Metzger is a partner with Coudert Brothers and former General Counsel of Asian Development Bank. Barry has extensive experience with international projects and investments, both as a result of his many years at Coudert Brothers and as a result of his service at the Asian Development Bank. Jon Sohn, our second panelist, is an International Policy Analyst/IFI Campaigner at Friends of the Earth, where he focuses on international financial institutions, primarily ECAs, such as OPIC and US Eximbank. He was formerly Counsel and Environmental Program Officer at OPIC. Amelia (Amy) Porges, our third speaker, is Of Counsel at Powell, Goldstein, Frazer & Murphy, where she focuses on international business matters. Before joining Powell Goldstein, Ms. Porges was Senior Counsel for Dispute Settlement at the Office of the United States Trade Representative. Please join me in welcoming our panelists.